



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Ebasco Constructors, Inc.; Kimmins Thermal Corp.; AWD Technologies, Inc.; and Chemical Waste Management, Inc.

**File:** B-244406; B-244406.2; B-244406.3; B-244406.4

**Date:** October 16, 1991

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### DIGEST

1. Protester's challenge to agency's evaluation of its proposal is denied where protester has not shown that the evaluation was unreasonable or inconsistent with the evaluation criteria listed in the solicitation.
2. In a negotiated procurement, the contracting agency has broad discretion in making cost/technical tradeoffs. Award to higher-priced, higher-rated offeror is not objectionable where the prices of other offerors in the competitive range were 97 percent to 99 percent of the awardee's price, but their technical proposals received scores only 87 percent to 92 percent as high as the awardee's technical proposal, and the agency viewed the scores as accurately reflecting the relative technical merit.

3. Agency properly excluded proposal from the competitive range where the initial technical proposal failed to meet the solicitation requirements in 39 of 83 evaluation areas and, following discussions and submission of revised proposals, the proposal still failed to comply with solicitation requirements in eight evaluation areas.

4. Protest that solicitation providing for cost/technical tradeoffs was arbitrary and that the priority of technical evaluation factors listed in the RFP was improper is untimely where these provisions were clear on the face of the solicitation, but the protest was not filed until after contract award.

5. Protest that agency failed to conduct discussions with offeror regarding aspects of its proposal that met the solicitation requirements but did not receive the highest point scores possible is denied because an agency is not obligated to discuss every aspect of a proposal that receives less than the maximum possible score.

6. Protest that agency failed to follow stated evaluation methodology by scoring proposals during the initial evaluation and not revealing the precise scoring technique to be used is denied where the solicitation advised offerors of the broad scoring method to be employed and gave reasonably definite information concerning how proposals would be scored, and when in the process such scoring would occur.

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#### DECISION

Ebasco Constructors, Inc. (Ebasco); Kimmins Thermal Corporation (Kimmins)<sup>1</sup>; AWD Technologies, Inc. (AWD); and Chemical Waste Management, Inc. (ChemWaste) protest the award of a contract to IT Corporation/OHM, a Joint Venture (IT/OHM) under request for proposals (RFP) No. DACW 41-90-R-0037, issued by the Department of the Army, Corps of Engineers, for construction of the Bayou Bonfouca Source Control Operable Unit at Bayou Bonfouca, St. Tammany Parish, Louisiana. Ebasco, AWD and ChemWaste each allege that the

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<sup>1</sup> Kimmins is also referred to as ThermoCor, Inc.

lower price of its proposal outweighed any technical advantage offered by IT/OHM. Kimmins, which was the only one of these protesters eliminated from the competitive range, challenges its elimination.<sup>2</sup>

We deny the protests.

#### BACKGROUND

The solicitation was issued in September 1990, and several amendments followed. As amended, the solicitation contemplated award of a firm, fixed-price contract for performance of various remediation tasks including: excavation and incineration of contaminated bayou sediments; placement and maintenance of a Resource Conservation Recovery Act (RCRA) cap over the incinerator ash; placement of a layer of clean material within the bayou following excavation; and operation of an existing groundwater extraction and treatment system for a 2-year period. The RFP divided the tasks to be performed into a base schedule and an option schedule.

Offerors were required to submit separate price and technical proposals. The RFP provided that technical proposals would be evaluated on the basis of 21 evaluation factors which were listed in the RFP in descending order of importance.<sup>3</sup> For evaluation purposes, the 21 factors were

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<sup>2</sup> Two other protests are currently pending in our Office filed by two other offerors that were also excluded from the competitive range. Because those protests, which followed adverse decisions in agency-level protests, were filed substantially later than the four protests decided today, the records are not yet complete and we will issue separate decisions resolving them.

<sup>3</sup> These factors were:

- (1) Materials Handling and Processing (includes incineration);
- (2) Air Quality Monitoring and Controls;
- (3) Bayou Dredging and Bayou Bank Monitoring;
- (4) Organization;
- (5) Personnel;
- (6) Corporate Commitments;
- (7) Wastewater Treatment;
- (8) Stormwater Management;
- (9) Settlement;
- (10) Bayou Channel Fill;
- (11) Landfill;
- (12) Health and Safety;
- (13) Spill Control;

further divided into 83 evaluation areas with various weights assigned to each area reflecting the overall order of importance established in the solicitation.

The RFP further provided that award would be made to the offeror whose proposal offered the best overall value to the government, stating:

"[T]his will be determined by comparing differences in the value of the above technical factors with differences in the cost to the Government. In making this comparison the Government is concerned with striking the most advantageous balance between these factors and cost to the Government. The closer the final, evaluated factor scores of acceptable offers are to one another, the greater will be the importance of cost factors in making the award determination. The closer the final cost factors are to one another, the greater will be the importance of the technical scores in making the award determination." (Emphasis in original.)

Seven offerors submitted initial technical proposals on March 4, 1991, and price proposals were submitted on March 22.<sup>4</sup> The technical quality evaluation panel (TQEP) evaluated the technical proposals by assigning a score of 0 to 4 in each of the evaluation areas.<sup>5</sup> The number of

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- (14) Quality Control;
  - (15) Sitework and Site Layout;
  - (16) Conceptual Project Delivery Schedule;
  - (17) Water Monitoring;
  - (18) Soil Sampling and Analysis;
  - (19) Environmental Data Management and Reporting;
  - (20) Project Experience; and
  - (21) Record of Performance.

<sup>4</sup> The separate price proposal due date was established because of a delay in receiving the applicable hazardous waste disposal wage rates from the Department of Labor.

<sup>5</sup> The agency's source selection plan provided that a score of 0 meant the proposal was clearly deficient and could not be corrected without substantial changes or complex negotiation; a score of 1 meant the proposal was deficient, but could be corrected through simple negotiation; a score of 2 meant the proposal minimally met the solicitation requirements; and scores of 3 or 4 meant the proposal met

evaluation areas in which the various proposals were deficient (that is, areas where they had received ratings of 0 or 1) ranged from 18 to 72.

The price evaluation panel also reviewed the price proposals, determining that the proposals did not appear unbalanced and checking for math errors. The panel then ranked the price proposals on the basis of stated price, determined that the proposals fell into three groups ("low," "middle," and "high"), and calculated an average price for each group.<sup>6</sup> The proposals of ChemWaste and AWD fell into the "high" group; the proposals of Ebasco and IT/OHM fell into the "middle" group; and Kimmins' proposal fell into the "low" group.<sup>7</sup>

On April 8, the source selection authority (SSA) established an initial competitive range consisting of all seven offerors. By letters dated April 12, the agency initiated discussions with each offeror, advising them of the specific areas in which their proposals were technically deficient. The offerors responded by submitting revised technical proposals on April 24, which the TQEP again evaluated. After this evaluation, the TQEP determined that AWD's and IT/OHM's proposals met the RFP's requirements in all of the evaluation areas; Ebasco's and ChemWaste's proposals were deficient in three evaluation areas; and Kimmins' proposal was deficient in eight evaluation areas.<sup>8</sup>

On May 9, the source selection board (SSB) met and was briefed on the proposal evaluation results. The SSB was given narrative evaluation summaries for each proposal along with matrices which summarized the technical ratings for

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the solicitation requirements and offered "considerable" advantage or "great" advantage to the government in the areas of evaluation.

<sup>6</sup> The average price for the "low" group was \$75,094,705; the average price for the "middle" group was \$114,010,258; the average price for the "high" group was \$126,081,476.

<sup>7</sup> The price proposals of the two offerors not addressed in this decision also fell within the "low" group.

<sup>8</sup> The proposal of one of the other two offerors not considered in this decision was also evaluated as deficient in eight evaluation areas and the other was deficient in substantially more areas.

each proposal by evaluation factor, line item, and total score. The SSB was also advised as to which group ("low," "middle," or "high") each price proposal was in and the average price for each group.

Based on the information provided, the SSB concluded that Kimmins' proposal (and the proposals of the other two offerors not addressed in this decision) contained "significant technical deficiencies" and that major revisions to those proposals would be necessary to bring them into compliance with the solicitation requirements. Because these offerors had been afforded an opportunity to correct their proposal deficiencies through discussions, but had failed to do so in at least eight evaluation areas, the SSB questioned whether they fully understood the work that would be required. Because these revised proposals still failed to meet the solicitation requirements in a significant number of evaluation areas, the SSB concluded that these three offerors had no reasonable chance for award and recommended that the SSA not include them in the competitive range. The SSA accepted this recommendation and excluded the proposals of Kimmins and the other two offerors from the competitive range.

On May 10, a request for BAFOs was issued to the four offerors remaining in the competitive range (Ebasco, AWD, ChemWaste, and IT/OHM). AWD's and IT/OHM's proposals were fully compliant with all of the RFP's requirements; accordingly, the agency did not request further information regarding their proposals. Because the proposals submitted by Ebasco and ChemWaste contained minor deficiencies, the agency requested corrections or clarifications in the deficient areas. BAFOs were received from all offerors by May 17.

The TQEP evaluated the BAFOs, revising the technical scores where appropriate, and provided the results of its evaluation to the SSB. The SSB then compared the price and technical differences of all of the proposals and determined that the proposal submitted by IT/OHM represented the best overall value to the government, since the other offerors' prices were 97 percent to 99 percent of IT/OHM's price, but their technical proposals were evaluated as offering only 87 percent to 92 percent of the technical quality offered by IT/OHM. On May 31, the SSA awarded the contract to IT/OHM and notified the unsuccessful offerors.

#### EBASCO'S PROTEST

Ebasco challenges the award on the basis that the procurement was conducted improperly due to the agency's failure to evaluate Ebasco's technical proposal in

accordance with the criteria revealed in the RFP.<sup>9</sup> Specifically, the protester challenges the agency's evaluation of the materials handling and processing category, the most important technical factor, under which its proposal received a score of 1, arguing that "the agency essentially required Ebasco to utilize a dewatering method and segregation technique when such a requirement is not found anywhere in the RFP." The protester alleges that the process it proposed is a tested and acceptable method, and that requiring a different system implicitly changes the solicitation's performance requirements.<sup>10</sup>

In reviewing protests against the propriety of an agency evaluation of proposals, it is not the function of our Office to independently evaluate those proposals. ACM Env'tl. Servs., Inc., B-242064, Mar. 7, 1991, 91-1 CPD ¶ 255. Rather, the determination of the relative desirability and technical adequacy of the proposals is primarily a matter of agency discretion which we will not disturb unless it is shown to be without a reasonable basis or inconsistent with the evaluation criteria listed in the RFP. Pemco Aeroplex Inc., B-239672.5, Apr. 12, 1991, 91-1 CPD ¶ 367. The mere fact that a protester disagrees with the agency does not render an evaluation unreasonable. Id.

The RFP contains a detailed outline of the materials handling and processing and incineration requirements which includes a description of the information the agency expects in the proposal. Specifically, the RFP instructs offerors to:

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<sup>9</sup> Ebasco originally also alleged that the agency failed to conduct adequate discussions and a debriefing within 10 days after award. The contracting officer fully responded to these contentions in the report, explaining that Ebasco was provided with two rounds of discussions pointing out its deficiencies, and two opportunities to submit revisions. The agency also pointed out that Ebasco's debriefing was held approximately 1 week after it had submitted its written request. Since Ebasco did not refute these explanations, we will not address the issues in this decision.

<sup>10</sup> Ebasco's comments to the agency report are primarily devoted to a newly raised argument, namely, that the agency improperly eliminated Kimmins from the competitive range. We dismiss this aspect of Ebasco's protest because Ebasco was not adversely affected by the competitive range determination. Kimmins has raised this issue on its own behalf.

"Submit a description of the sorting, sizing, dewatering, and material handling equipment. The description shall provide, as a minimum, the following information:

- (1) Equipment type and manufacturer's name, model number, and capacity rating.
- (2) Approach to site preparation, mobilization, equipment erection, initial start-up and testing, and demobilization.
- (3) Proposed material sampling methods.
- (4) Proposed interim and long-term storage facilities.
- (5) Layout of equipment.
- (6) Means to handle oversized materials and methods to reduce for processing and landfilling.
- (7) Methods to maintain noise within specified limits.
- (8) Methods to control air emissions."

Ebasco's proposal received a rating of 1 for its material handling based on the agency's following findings:

"Did not describe how non-combustible and combustible materials would be segregated. No equipment description (such as shredder and blender) provided (type, manufacturer, size, etc.). Did not describe size and configuration of dewatering process. No discussion of mob/demob [mobilization/demobilization]. Last sentence is qualifying statement. Incomplete discussion of operational controls for air emissions. No discussion of start-up, testing, and sampling. Only noise related to engines discussed, also need for shredder, blender, and other equipment. BAFO EVALUATION: Still not satisfactorily answered."

Even though Ebasco was provided with two opportunities to address these specific concerns of the agency, it provided only limited information and allayed only some of the agency's concerns. The agency has no duty to conduct successive rounds of discussions to resolve technical



deficiencies remaining in a BAFO. See Intertec Aviation, B-239672.4, Apr. 4, 1991, 91-1 CPD ¶ 348. While Ebasco did eliminate the "qualifying statement," and provide the equipment information on the shredder and blender, it did not provide the other information specifically asked for in the discussion letters. Moreover, contrary to the protester's argument, the agency did not find that Ebasco's proposed process itself was technically unacceptable; rather, the evaluators determined that Ebasco did not provide sufficient information concerning all of the components of the system, for example, the mobilization and demobilization, to enable the agency to determine whether the proposed approach was technically acceptable.

Further, although Ebasco received only a single rating of 1, it also received the highest number of ratings of 2 of any offeror in the competitive range, 73 out of 83, and it has not challenged the rest of its evaluation. Even if Ebasco's proposal were underrated in the materials handling criteria, its low rating under the majority of the other categories would still leave its proposal as the lowest technically rated.

To the extent that Ebasco challenges the agency's cost/technical tradeoff, the RFP specifically provided for such an analysis. A contracting agency has broad discretion in making cost/technical tradeoffs, the extent of which is governed by the tests of rationality and consistency with the evaluation criteria. ACM Env'tl. Servs., Inc., supra. Awards are properly made to technically superior, higher-priced offerors where the agency has reasonably determined that the technical difference is sufficiently significant to outweigh the price difference. Suncoast Scientific, Inc., B-239614, Sept. 14, 1990, 90-2 CPD ¶ 211. Here, while Ebasco received the lowest technical score, it did not offer the lowest price. In fact, Ebasco's price was only approximately 0.9 percent lower than IT/OHM's, yet its technical quality was numerically scored 13 percent lower than the awardee's, and the agency considered this technical scoring differential as an accurate reflection of the relative technical merits of the two proposals. We find reasonable the agency's determination that the relative technical merits of the awardee's proposal outweighed its slightly higher cost.

Ebasco's protest is denied.

#### KIMMINS' PROTEST

Kimmins protests that it was improperly excluded from the competitive range on the basis of its technical deficiencies despite its low price, and maintains that it should have been afforded an additional opportunity to revise and

supplement the information in its technical proposal. We disagree.

The evaluation of proposals and the resulting determination as to whether an offeror is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best methods of accommodating them. Smith Bright Assocs., B-240317, Nov. 9, 1990, 90-2 CPD ¶ 382; Abt Assocs., Inc., B-237060, 2, Feb. 26, 1990, 90-1 CPD ¶ 223. A procuring agency is not required to include a technically unacceptable proposal in the competitive range where deficiencies in the proposal are so material that major revisions would be necessary to make the proposal acceptable, and a proposal which does not demonstrate the required understanding may be rejected as unacceptable. National Contract Management Servs., B-240564, Dec. 3, 1990, 90-2 CPD ¶ 446; S.T. Research Corp., B-232264, Nov. 3, 1988, 88-2 CPD ¶ 435; John W. Gracey, B-228540, Feb. 26, 1988, 88-1 CPD ¶ 199. In reviewing an agency's evaluation, we will not substitute our judgment regarding the merits of the proposals for that of the agency, but instead will examine the agency's evaluation to determine whether it was reasonable. Id.

Here, Kimmins' initial proposal was evaluated as failing to meet the RFP's requirements in 39 of 83 evaluation areas. Following discussions, Kimmins' proposal was still deficient in eight areas. The agency concluded that, even after discussions in which Kimmins was directed to the deficient areas in its proposal, Kimmins' revised proposal continued to include "significant technical deficiencies" which were so substantial that only major revisions or additions could bring the proposal into compliance with the RFP requirements. In particular, the agency concluded that Kimmins' proposal failed to meet the RFP requirements under the following evaluation factors: air quality monitoring and controls; settlement; landfill; conceptual project delivery schedule; soil sampling and analysis; and environmental data management and reporting.

Based on our review of the record, we find reasonable the agency's evaluation of Kimmins' proposal and its resulting decision to exclude Kimmins' proposal from the competitive range. For example, regarding air quality monitoring and controls (the second most important evaluation factor), the agency found that Kimmins' initial proposal failed to meet

the solicitation requirements regarding the short-term and long-term measures proposed in the event ambient air quality limits were exceeded.<sup>11</sup> In conducting discussions regarding this aspect of Kimmins' proposal, the agency gave a specific example of a potential situation under which Kimmins' proposal did not meet the RFP requirements. In submitting its revised proposal, Kimmins did not alter the data provided in its initial submission. Accordingly, the agency properly concluded that Kimmins' revised proposal continued to fall short of the solicitation requirements.

By way of further example, during discussions, the agency advised Kimmins that its proposed project delivery schedule appeared overly optimistic and failed to include all critical activities. In its revised proposal, Kimmins' proposed schedule still failed to address all of the critical activities. The agency concluded from this that Kimmins did not recognize which activities were critical. The agency also concluded that Kimmins' revised proposal continued to inadequately discuss: how it intended to perform the RFP requirements regarding soil sampling and analysis; how an excess or shortage of material would affect the final contours of the landfill; how it intended to respond to the significant settlement of the project site that was expected; and how it intended to relate user documentation to the hardware, software and recordkeeping of samples it proposed.

Kimmins argues that it was improper for the agency to exclude Kimmins' proposal from the competition without giving it another opportunity to correct these deficiencies. We disagree. Although discussions must be meaningful, see Space Servs. Inc. of Am., et al., B-237986 et al., Apr. 16, 1990, 90-1 CPD ¶ 392, agencies are not required to "spoon feed" offerors as to what factors must be addressed in an acceptable proposal or to conduct successive rounds of

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<sup>11</sup> During the debriefing which the agency conducted with Kimmins, the agency erroneously advised Kimmins that its questions regarding air monitoring and controls had been adequately resolved in its revised proposal. However, as the agency clearly explained in its report, and as supported by the evaluation record, Kimmins' proposal was rated as being deficient under this evaluation factor. Kimmins protests that this mistake by the agency during the debriefing constitutes a separate basis for protest. We disagree. Since a debriefing is only an after-the-fact explanation of the selection decision and not the selection itself, in resolving a protest, our Office is primarily concerned with whether the selection decision itself was proper and supported by the record. See JSA Healthcare Corp., B-242313; B-242313.2, Apr. 19, 1991, 91-1 CPD ¶ 388.

discussions until all deficiencies are corrected. Wyle Laboratories, B-239671, Sept. 19, 1990, 90-2 CPD ¶ 231; Rainbow Technology, Inc., B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66. Continuing negotiations with offerors that have no reasonable chance for award is unfair to those offerors and adversely affects the integrity of the procurement process since it requires offerors to incur needless expenditures of time and money in futile pursuit of procurements. See The Cadmus Group, Inc., B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ \_\_\_\_; Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273.

Here, the agency conducted discussions with Kimmins which directed it to all of the deficient areas of its proposal. Although Kimmins corrected some of the deficiencies which the agency identified, its revised proposal continued to fail to meet the RFP's minimal requirements in nearly 10 percent of the evaluation areas. Based on the record presented, the agency reasonably concluded that Kimmins' deficiencies were so substantial as to require major revisions or additions to its proposal such that the proposal had no reasonable chance for award. Accordingly, Kimmins' proposal was properly excluded from the competitive range on the basis of its technical deficiencies.

Kimmins' protest is denied.

#### AWD'S PROTEST

AWD protests that the solicitation improperly permitted the agency to arbitrarily balance cost and technical factors; that the ranking of evaluation factors listed in the solicitation was improper; and that the agency failed to conduct adequate discussions with AWD.

AWD first refers to the portion of the solicitation regarding the cost/technical tradeoff the agency intended to perform which stated:

"the closer the final evaluated factor scores . . . are to one another, the greater will be the importance of cost factors . . . [and] the closer the final cost factors are to one another, the greater the importance of technical factors." (Emphasis in original.)

AWD argues that the solicitation "is deficient in that it contains no system or other objective guidance as to how the government will accomplish this objective." AWD also challenges the provisions of the solicitation which established the relative importance of the evaluation factors, arguing that "for a project of this technical complexity

. . . the [agency] should have assigned far greater importance to the relevant project experience of the offeror's team as well as their past record of performance on projects of a similar nature."

Our Bid Protest Regulations require that a protest based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Here, the bases for AWD's protest regarding alleged defects in the solicitation were clearly apparent prior to the submission of proposals. Since AWD first protested after award had been made, its protest regarding these matters is untimely.

AWD also protests that the agency failed to conduct adequate discussions with it since the agency issued only a "set of general questions" regarding areas of its proposal which were deficient. AWD asserts that the agency was obligated to conduct discussions regarding other areas of its proposal where it met the solicitation's requirements but failed to fully demonstrate all the potential advantages its approach may have had and, accordingly, did not receive the maximum score possible.

The Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR) require that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. See 10 U.S.C. § 2305(b)(4)(B) (1988); FAR § 15.610(b); Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd on recon., B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. However, while agencies generally must conduct discussions with all offerors in the competitive range, advising them of deficiencies in their proposals and offering them the opportunity to submit revised proposals, this does not mean that offerors are entitled to all-encompassing discussions. Agencies are only required to lead offerors into areas of their proposals considered deficient. Where a proposal is considered acceptable and in the competitive range, an agency is not obligated to discuss aspects of the proposal that met the solicitation requirements but received less than the maximum possible score. Johnson, Basin and Shaw, Inc., B-240265 et al., Nov. 7, 1990, 90-2 CPD ¶ 371; Mech El Inc., B-233092, Feb. 21, 1989, 89-1 CPD ¶ 175.

Here, since the agency conducted discussions with AWD regarding all of the areas in which its proposal failed to meet the solicitation requirements, the agency satisfied its obligation to conduct meaningful discussions.

AWD's protest is dismissed in part and denied in part.

## CHEMWASTE'S PROTEST

ChemWaste challenges the award on the grounds that the agency evaluated technical proposals in accordance with undisclosed criteria, and did not rationally justify its award to the highest-priced, competitive range offeror. ChemWaste also alleged for the first time in its comments on the agency report that the Army changed the evaluation factors after receiving proposals, failed to conduct meaningful discussions with the protester, and improperly evaluated IT/OHM's technical proposal. Our Bid Protest Regulations require that protests be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1991). When a protester supplements a timely protest with new and independent grounds, the latter raised allegations must independently satisfy the timeliness requirements. Arthur D. Little, Inc., B-243450.3, June 19, 1991, 91-1 CPD ¶ 583. At the latest, ChemWaste learned of these new grounds of protest from the agency report which it received on August 19. ChemWaste did not raise these new issues within 10 working days after it received the report, but rather waited until it filed its comments.<sup>12</sup> Therefore, these issues are dismissed as untimely. Id.

The protester objects to the TQEP's evaluation scheme, arguing that the method utilized by the agency was not the one disclosed in the RFP. Specifically, the protester alleges that the evaluators awarded "extra points" for areas in a technical proposal that exceeded the minimum requirements, during the initial technical evaluation. ChemWaste argues that it "understood" the RFP to have an evaluation scheme wherein proposals would be initially scored on a pass/fail basis, and that the competitive range determination would be based on these ratings.<sup>13</sup> ChemWaste argues that this process of awarding "extra points" was an undisclosed, subjective evaluation criteria, which predetermined the eventual award to IT/OHM before BAFOs were received and evaluated. ChemWaste argues that this

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<sup>12</sup> ChemWaste was granted a time extension for purposes of filing its comments; however, this extension did not waive the timeliness rules.

<sup>13</sup> The protester also contends that the competitive range determination was procedurally flawed in that it was not approved by the proper authority. We also dismiss this allegation as untimely since all parties were notified of this procedural error by a letter dated August 8, but ChemWaste did not protest it until September 3, more than 10 working days later. 4 C.F.R. § 21.2(a)(2).



initially flawed process was exacerbated by the alleged "cap" on BAFO scores of a 2 on any factor initially rated 0 or 1. The protester argues that if the agency intended to use this subjective rating system, it was required to reveal it in the solicitation.

ChemWaste's allegations contradict the clear language of the solicitation. Although the RFP did not disclose the 0 to 4 rating system, it clearly provided for a relative rating. Offerors are on notice that qualitative distinctions will be made among proposals where technical factors are part of the competitive evaluation. Chadwick-Helmuth Co., Inc., B-238645.2, Nov. 19, 1990, 70 Comp. Gen. \_\_\_\_\_, 90-2 CPD ¶ 400. The proposal information section of the RFP included the statement that:

"The Government evaluates each proposal individually and independently, first for conformance to the minimum requirements expressed in this RFP. Those proposals that do not meet the minimum level required by this RFP may be disqualified at this point. The remaining proposals are then further evaluated for technical merit exceeding the minimum RFP requirements." (Emphasis added.)

Under the section entitled "EVALUATION PROCEDURES," the solicitation further provided:

"Each proposal submitted will be reviewed initially to determine if it conforms to the general requirements of the RFP. If it does not conform and would be incapable of being placed in the competitive range without significant changes, the proposal will be rejected and will not be point scored. Those proposals which have been properly submitted will be point scored and evaluated to determine a competitive range." (Emphasis added.)

Finally, the solicitation provided the following explanation of the evaluation process:

"The system will involve a predetermined weighting factor assigned to a detailed breakdown of each part of the submittal. The weighting factor on each part is based on the panel's appraisal of the importance of the given part. The actual point score assigned to a part will be determined by

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the panel member grading that part, and will reflect the quality of the proposal on that particular part. The final points given to a part will equal the assigned points times the weight factor."

While a solicitation must advise offerors of the broad method of scoring to be employed and give reasonably definite information concerning the relative importance of the evaluation factors, the precise numerical weight and scoring method to be used need not be disclosed. Id.

Here, the RFP was very specific, and ChemWaste was provided with sufficient information to know what the evaluation factors and subfactors were, as well as how and when its proposal would be evaluated and scored. The solicitation clearly disclosed that proposals would be point scored during the initial evaluation, and nowhere in the RFP was it stated that the competitive range would consist of those proposals which had passed a pass/fail portion of the evaluation. Therefore, ChemWaste had sufficient information to enable it to submit a highly rated technical proposal, and its "understanding" of the evaluation process is contrary to the express language of the solicitation. We have no basis to find that it was improper for the agency to rate proposals using the 0 to 4 system, or that the agency was required to inform offerors of its specific rating system.

Moreover, ChemWaste's allegation that the initial scoring of proposals established the awardee prior to discussions due to the alleged "cap" on scores is without merit. The record establishes that evaluators were free to increase an offeror's score to a 4 if the clarifications or revisions so warranted and, in fact, this occurred for 2 out of the 4 offerors in the competitive range. The fact that ChemWaste's scores did not increase above a 2 does not demonstrate disparate treatment or a cap. Further the protester was provided with all of the evaluation and source selection documents, and has neither alleged how its proposal warranted a higher score, nor challenged the evaluation of a single criterion of its proposal.

ChemWaste next contends that the agency's cost/technical tradeoff is wholly deficient. The protester argues that the agency "has neither adequately supported nor reasonably justified its high technical, high cost decision." ChemWaste alleges that all of the source selection documents are "peculiarly silent" with respect to those aspects of IT/OHM's proposal that merit an almost \$3 million premium over ChemWaste's fully compliant proposal. The protester argues that this failure is "particularly egregious since the underlying RFP is a performance specification." The



protester alleges that under this type of solicitation, regardless of the amount that the Army pays for the performance, it will receive the identical end product, and therefore, it must specifically articulate the extra services and/or technical advantage which warrant the higher price. The protester argues that award was justified on mere affordability, which was not disclosed in the RFP, and thus was improper.<sup>14</sup>

As ChemWaste acknowledges, in a negotiated procurement, unless the RFP so specifies, there is no requirement that award be based on lowest cost. Stewart-Warner Elecs. Corp., B-235774.3, Dec. 27, 1989, 89-2 CPD ¶ 598. The RFP did not seek solely an end product as ChemWaste suggests, but rather a very complex and potentially dangerous cleanup of hazardous and toxic wastes. The solicitation set forth specific safety and performance standards that offerors had to meet to be minimally acceptable, but there was also a need for offerors to demonstrate how they would comply and the methods they anticipated using so that the agency could be assured of safe and proper performance. The agency's concerns in this regard stem from the serious risks involved during performance to the workers and to surrounding residents in the community. In fact, the three most important evaluation criteria disclosed in the RFP relate to the proposed methodology and not the end product.

The RFP provided that while cost and technical considerations were of equal importance, when final evaluated costs were close, technical merit would become more important. The agency concluded that given the size of this procurement, the technical superiority of IT/OHM's technical proposal (which was scored almost 12 percent higher than ChemWaste's technical proposal) outweighed the \$2.8 million cost savings (approximately 2.6 percent) offered by ChemWaste.

ChemWaste disputes the agency's conclusion that \$2.8 million is an insignificant amount, arguing that this sum is much more than the difference between other Superfund proposed contract prices, and that the sum itself is too large to be



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<sup>14</sup> ChemWaste initially contended at length that the agency improperly engaged in a dollar per point analysis to arrive at its award determination. While the protester maintains this view, in its comments it acknowledged that the "agency report fails to establish that the Corps engaged in a dollar per point analysis." We agree that there is no evidence to support the protester's allegation and, in fact, there is substantial documentation which demonstrates that the agency did not conduct a dollar per point analysis.

considered insignificant. However, this analysis fails to consider that given the framework of this procurement, \$2.8 million constitutes less than a 3 percent savings for the government, and that most Superfund contracts do not have such differences because they are considerably lower cost procurements.

The agency adequately identified those areas of IT/OHM's proposal that warranted its receiving the highest technical score and, in fact, IT/OHM received the highest number of 3's and 4's for the superior methods it proposed to allay the agency's justified and disclosed concerns regarding the risks posed by performance. Only in the final analysis, when the agency was applying the award formula identified in the RFP, did it use a numerical rating system. Accordingly, the agency had a legitimate basis for its relatively high assessment of IT/OHM's technical proposal. In the context of this procurement, we find that the agency reasonably concluded that a savings of less than 3 percent offered by ChemWaste was not outweighed by the greater technical merit offered by IT/OHM and that this determination was consistent with the criteria set out in the RFP. See Stewart-Warner Elecs. Corp., supra.

ChemWaste's protest is denied.

  
 James F. Hinchman  
General Counsel